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IN THE

Supreme Court of the United States

October Term, 1981

TODD SHIPYARDS CORPORATION AND THE TRAVELERS INSURANCE COMPANY,
Petitioners

v.

NORMAN C. ALLAN, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the term "injury" in the 1972 amendment to §13(a) of the Longshoremen's Act can be construed to mean "compensable injury" or "impairment of earning power" or "disability," thereby legislatively overruling this Court's holding in *Pillsbury v. United Engineering Co.*,[1] which had clearly distinguished "injury" from "compensable injury" or "disability" in the same statute.

2. Whether there was substantial evidence in the record, regardless of the Court of Appeals' interpretation of §13(a) *as amended*, to support the administrative law judge's time bar of the claim for claimant's failure to file claim for over two years after the accident, based on the judge's conclusions that claimant was immediately aware of his accident and traumatic injury and for two years thereafter remained in constant pain which interfered with his full earning capacity, despite lack of an early diagnosis of his precise medical problem.

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1. 342 U.S. 197, 72 S. Ct. 223 (1952).

LIST OF PARTIES

The caption contains the names of all parties[2] to the proceedings below.

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2. In compliance with Rule 28.1, Petitioner Todd Shipyards Corporation has one affiliate or subsidiary not wholly owned: Montana Valley Land Company. Petitioner The Travelers Insurance Company is a wholly owned subsidiary of The Travelers Corporation. The Travelers Corporation has a number of other wholly owned subsidiaries, the names of which are not being listed on advice from the Clerk of the Court.

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v.

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Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

The Decision and Order of Administrative Law Judge Frank W. Vanderheyden, dated January 20, 1975, is not reported, but is set forth in Appendix pages C-1 through C-34, *infra*. Judge Vanderheyden's Errata, dated January 27, 1975, is set forth in Appendix page D-1, *infra*. The initial decision of the Benefits Review Board, dated October 15, 1975, is reported at 2 BRBS 351 and is set forth in Appendix pages E-1 through E-9, *infra*. The Order of the United States Court of Appeals for the Ninth Circuit, dated May 14, 1976, on the initial appeal, is not reported but is set forth in Appendix page F-1, *infra*.

On remand, the initial Decision and Order of Administrative Law Judge Joseph A. Matera, dated June 29, 1977, is not reported, but is set forth in Appendix pages G-1 through G-18, *infra*. Judge Matera's Supplemental Decision on Motion for Reconsideration, dated August 8, 1977, is likewise not reported, but is set forth in Appendix pages H-1 through H-5, *infra*. The second Decision of the Benefits Review Board, dated July 21, 1978, is reported at 8 BRBS 570, and is set forth in Appendix pages I-1 through I-15, *infra*. The last Decision on Remand by Administrative Law Judge Matera, dated August 31, 1978, is not reported, but is set forth in Appendix pages J-1 through J-6, *infra*. The third Decision and Order of the Benefits Review Board, dated July 31, 1980, is reported at 12 BRBS 589, and is set forth in Appendix pages K-1 through K-8, *infra*.

The Opinion on the merits of the United States Court of Appeals for the Ninth Circuit, dated January 22, 1982, is reported at 666 F.2d 399 and is set forth in Appendix pages A-1 through A-13, *infra*. The Order of the Court of Appeals denying the Petition for Rehearing, dated March 25, 1982, is not reported, but is set forth in Appendix pages B-1 through B-2, *infra*.

JURISDICTION

On January 22, 1982, the Court of Appeals decided and entered its Decision affirming the Benefits Review Board's reversal of Administrative Law Judge Vanderheyden's dismissal of the claim. A Petition for Rehearing was timely filed February 5, 1982, and was denied by Order dated March 25, 1982. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Prior to the 1972 amendments, §13(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §913(a), read:[3]

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3. Act of Mar. 4, 1927, ch. 509, §13, 44 Stat. 1432.

> The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred.

As amended in 1972, §13(a) of the Act, 33 U.S.C. §913(a) reads:[4]

> Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim therefor is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

Neither §2(2), 33 U.S.C. §902(2), nor §2(10), 33 U.S.C. §902(10), was amended in 1972, and read:[5]

> When used in this Act—
>
> . . . .
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
>
> . . . .

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4. Act of Oct. 27, 1972, Pub. L. 92-576, §12(b), 86 Stat. 1259.

5. Act of Mar. 4, 1927, ch. 509, §2, 44 Stat. 1424.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.

STATEMENT OF THE CASE

Claimant Allan, an employee of petitioner Todd Shipyards Corp., was injured while aboard a vessel at Todd's premises in Seattle on December 9, 1971, when a 10 lb. piece of metal fell from above striking him on the head and shoulder. He saw "stars," suffered immediate pain and dizziness, and went to Todd's first aid facility, where he was given aspirin for headache and told to return the next day to see a doctor if still having problems. Claimant continued working that day though pain in his neck increased. (Appendix, p. C-6.)

The next day, December 10, 1971, claimant saw Dr. Tobin for his persisting neck pain. Dr. Tobin took x-rays of the cervical spine, which were normal. The doctor diagnosed post-contusion occipital headache and cervical myositis. He prescribed medication to relieve headaches and pain. Claimant was to return to see him as his condition might require. (Appendix, p. C-7.)

Though claimant missed little or no time from work over the ensuing two years, he remained in constant pain following his injury. By March, 1972, four months after his injury, claimant was still experiencing neck pain and had his medication refilled through the yard doctor, rather than returning to Dr. Tobin. (Appendix, p. C-8.) Claimant testified that he continued to have "awful headaches" and that after a hard day's work, he "would walk the floor or read most of the night." He later told his doctor that by April or May, 1973, his neck pain had worsened to the point that it was radiating down his right arm (Appendix, p. C-10), and that if he had not switched to a supervisory job, he would not have been able to continue heavy physical work due to his neck, shoulder and arm pain. Finally, in July, 1973, nineteen months after his original visit, claimant went to see Dr. Tobin for the second time. (Appendix, p. C-8.)

In November, 1973, Dr. Tobin took a second set of x-rays, which, when compared with those taken on the original visit, revealed a degenerative disc, which he advised claimant could well be the outcome of the December, 1971 injury. (Appendix, p. C-8-9.) Dr. Tobin referred claimant to Dr. Gibson for surgical consultation, and Dr. Gibson diagnosed progressive cervical spondylosis, initiated by the blow to claimant's head two years previously. (Appendix, p. C-9.) Claimant was hospitalized in January, 1974 for cervical disc removal and fusion. He returned to work at Todd in March, 1974 (Appendix, p. C-11) and in April, 1974 filed a claim for compensation with the Office of Workers' Compensation Programs under the Longshore Act. (Appendix, p. C-12, 15.) In his claim, he alleged December 9, 1971 as his date of injury.

Formal hearing was held under the Longshore Act, 33 U.S.C. §§901 *et seq.*, in October, 1974 before Administrative Law Judge Frank W. Vanderheyden, following which the claim was denied. Judge Vanderheyden concluded, *inter alia*, that claimant had been immediately aware of his injury and its relationship to the industrial accident on December 9, 1971 (Appendix, p. C-29-30); that claimant was never free from pain after his accident, and his condition was patent and obvious to him (Appendix, p. C-13); that from the outset claimant associated his continuing pain with the accident (Appendix, p. C-31); that the ultimate condition for which claimant underwent surgery was not a latent one, but a natural progression from the original trauma (Appendix, p. C-13, 28); that claimant was not misled medically (Appendix, p. C-28) and was never told by Dr. Tobin that his injuries were not attributable to his accident (Appendix, p. C-9); and that while claimant returned to his duties after the accident, the degree of pain he experienced interfered with his full earning capacity and consequently he suffered a loss of wage earning capacity on the open labor market (Appendix, p. C-33). Accordingly, Judge Vanderheyden ruled that claimant's claim filed in April, 1974 was time-barred under 33 U.S.C. §913(a) for having been filed more than one year after his injury of December 9, 1971. In the alternative, he ruled claimant's claim would still be barred even if he were to concede "the correctness [of] claimant's thesis that the

time limitation runs from the date of disability . . ." (Appendix, p. C-32)

Claimant appealed to the Benefits Review Board, which reversed Judge Vanderheyden and held that claimant's claim of April, 1974 was timely filed under 33 U.S.C. §913(a). (Appendix E.) The Board held that claimant's "injury" was his progressive cervical spondylosis, which was "latent" until "correctly diagnosed" by Dr. Gibson in December, 1973 (Appendix, p. E-5); that claimant did not sustain an "injury" within the meaning of 33 U.S.C. §913(a) until the "diagnosis" of cervical disc disease (Appendix, p. E-6); that claimant was not "injured" and, therefore, his time for filing a claim did not begin to run "until he became aware of the full character, extent, and impact of the harm done to him," (Appendix, p. E-9); and that the Act does not require a claimant to file a claim until an injury exists in "compensable degree." (Appendix, p. E-7.) Accordingly, the Board remanded the case for further appropriate action. Todd and Travelers then petitioned the Ninth Circuit to set aside the Board's Decision. However, granting a motion by the Director, the Ninth Circuit declined jurisdiction for lack of a "final order subject to review." (Appendix, p. F-1).

In May, 1977, a second formal hearing was held, before Administrative Law Judge Joseph A. Matera, on the issue of the extent of claimant's disability resulting in an award of a 25% permanent partial disability. (Appendix G and H.) Petitioners appealed to the Board, which vacated the award and remanded for redetermination (Appendix I). On remand, Judge Matera, without a further hearing, reaffirmed his earlier award. (Appendix J.) Petitioners again appealed to the Board, which, by Decision dated July 31, 1980, affirmed Judge Matera's award (Appendix K).

Finally, petitioners petitioned the Court of Appeals to reinstate Judge Vanderheyden's original dismissal of the claim as time-barred or, in the alternative, to modify the disability award. Jurisdiction was vested in the Ninth Circuit pursuant to 33 U.S.C. §921(c). The court affirmed the Board in every respect.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the Court of Appeals has:

(1) decided a federal question in a way in conflict with applicable decisions of this Court, and

(2) decided an important question of federal law which should be settled by this Court.

The Ninth Circuit's Standard

The court of appeals ruled that Administrative Law Judge Vanderheyden erred in applying the original version of §13(a) of the Act to bar Allan's claim. The court then held that Allan's claim was timely under §13(a) *as amended*. Obviously interpreting the 1972 amendment to §13(a), the court reasoned:

> The Board correctly overturned [the ALJ] decision. Allan was told several times by Dr. Tobin that his injury was only a bad bruise. Even though he had recurrent pain and dizziness, he tried to keep working. He was not aware that he suffered a *compensable injury* until a second set of X-rays revealed degenerated cervical discs in November 1973. Following *Stancil v. Massey*, 436 F.2d 274, 277 (D.C. Cir. 1970), the Board found that Allan was not "injured" for purposes of the statute of limitations until "he became aware of the *full character, extent, and impact of the harm done to him.*" Allan worked until his surgery in January, 1974. Only in November 1973 did Allan know that there was an injury in the sense contemplated by §13(a)—an impairment of earning power. Under this standard, the statute of limitations did not begin to run until November 1973. Allan filed in April 1974. The claim was not time-barred.

666 F.2d at 401-402; Appendix, p. A-7-8. (Court's emphasis.) The court's interpretation of §13(a) *as amended* is unmistakable: the term "injury" embodies the concept of compensability — *i.e.*, impairment of earning power — and therefore the one-year statute of limitations only commences running from a claimant's awareness that his condition is

compensable. In short, the court interprets "injury" under §13(a) *as amended* to be equivalent to "disability."[6]

Conflict With This Court's Decisions

Thirty years ago, this Court laid to rest the argument that "injury," as used in §13(a), embodies the concepts of "compensability" or "disability," in *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 72 S. Ct. 223 (1952). Several of the four consolidated claimants in *United Engineering* presented fact patterns almost identical to Allan's. Two of the four had been struck on the head, yet continued working for more than a year after their injuries at no reduction in wages but with continuing neck problems. The other two, with back and hand injuries respectively, also continued working beyond the one-year limitation period at their regular wages but with continuing pain and discomfort. This Court accepted the case on review to resolve a conflict between circuits.[7] In affirming the Ninth Circuit's dismissal of the claim as time-barred under §13(a), the Court succinctly distinguished "injury" from "compensability" and "disability" as used in the statute:

> But the right to recover for disability is one thing, and the right to file a claim is another. It has long been the practice of the Deputy Commissioner to permit filing to avoid the running of the one-year limitation period here involved. A proper interpretation of §§6(a) and 19(a) does not prohibit the filing of a claim before the accrual of seven days' disability. Each of the claimants here was immediately aware of his injury, received medical

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6. As relevant to this case, an "injury" is not *compensable* under the Act unless it results in a "disability." 33 U.S.C. §903(a). The Act separately defines "injury" and "disability." 33 U.S.C. §§902(2) and (10); (*See* "Statutes Involved," *supra*.) "Disability," by definition, is an impairment of earning power.

7. The conflict was between *Pillsbury v. United Engineering Co.*, 187 F.2d 987 (9th Cir. 1951), and *Great American Indemnity Co. v. Britton*, 179 F.2d 60 (D.C. Cir. 1949). The court commented that it had already had the same question before it earlier in *Kobilkin v. Pillsbury*, 103 F.2d 667 (9th Cir. 1939), *affirmed by equally divided court*, 309 U.S. 619, 60 S. Ct. 465 (1940).

treatment, and suffered continuous pain. We are not here dealing with a latent injury or an occupational disease.

We are not free, under the guise of construction, to amend the statute by inserting therein before the word "injury" the word "compensable" so as to make "injury" read as if it were "disability." Congress knew the difference between "disability" and "injury" and used the words advisedly. This view is especially compelling when it is noted that the two words are used in the same sentence of the limitations provision; therein "disability" is related to the right to compensation, while "injury" is related to the period within which the claim must be filed. Furthermore, Congress defined both "disability" and 'injury" in the Act, and its awareness of the difference is apparent throughout. Thus, we think that when Congress used "disability" and "injury" in the same sentence, making each word applicable to a different thing, it did not intend the carefully distinguished and separately defined words to mean the same thing. *Congress meant what it said when it limited recovery to one year from date of injury, and "injury" does not mean "disability."*

We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. *Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation.* While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us.

342 U.S. at 199-200, 72 S. Ct. at 224-225 (Footnote omitted) (Emphasis supplied). Thus, it seems abundantly clear that unless the 1972 amendment significantly altered the meaning of §13(a) as construed by this Court, the Court of Appeals committed plain error when it equated "injury" with "compensability" and "impairment of earning power."[8]

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8. Although *Kobilkin* and *United Engineering*, both of which arose out of the Ninth Circuit, were extensively briefed below, the court chose

The 1972 Amendments

Neither the language of §13(a) *as amended* nor the legislative history of the 1972 amendments supports the Court of Appeals' departure from the holding in *United Engineering*. A comparison of the original and amended versions of §13(a) discloses that Congress did not tamper with the *substance* of the first sentence of the original version — the sentence under interpretation in *United Engineering*. Notably, the 1972 amendment did not disturb the crucial language:

> ... [t]he right to compensation for disability . . . shall be barred unless claim therefor is filed within one year after the injury. . . .

33 U.S.C. §913(a). The terms "disability" and "injury" continue to be used in the same sentence. Moreover, Congress did not amend the definitions of those terms elsewhere in the Act. *See*, 33 U.S.C. §§902(2) and (10). Accordingly, unless Congress effectively overruled *United Engineering's* construction of §13(a) by its addition in 1972 of a new sentence at the end of that section, the Ninth Circuit's interpretation is plainly contrary to law.

Congress added the following sentence to §13(a) in 1972:[9]

Footnote 8 (con't)

not to mention, much less distinguish, either case in its opinion. The Benefits Review Board, on the other hand, *while applying §13(a), as amended*, nevertheless acknowledged that the administrative law judge, in relying upon *United Engineering*, "correctly held that, pursuant to Section 13(a), the filing requirement of one year from the date of 'injury' does not mean from the date of 'disability' (a medico-economic term under the Act)." (Appendix p. E-7.) The remainder of the Board's decision, which does not mention *United Engineering* again, appears irreconcilable with its acceptance of the continuing vitality of *United Engineering*.

9. By such language, Congress appears to have codified a tolling provision which had previously been judicially engrafted to the statute by some courts, particularly in occupational disease cases. *E.g., Aerojet-General Shipyards, Inc. v. O'Keeffe*, 413 F.2d 793 (5th Cir. 1969).

> The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

The key concepts in the new sentence for purposes of this case are "aware[ness]," "relationship," "employment," and "*injury*." Having retained the use of both "disability" and "injury" in the limitation language of the first sentence of §13(a), and with knowledge of this Court's prior construction of those terms in precisely this context, Congress nevertheless chose to peg the tolling provision contained in the last sentence to "injury," not "disability." Statutory construction requires that "injury" have the same meaning in both the first and last sentences of the same section of the statute, and it must be presumed that Congress so intended.[10]

The legislative history of the 1972 amendment lends no support to the Ninth Circuit's new interpretation of §13(a). Neither the Senate[11] nor House[12] Reports deemed the reasons for the amendment to §13(a) important enough to discuss. Surely, if Congress had intended such a major change in the interpretation of §13(a) of the Act as effected by the court below, there would have been some discussion of the *United Engineering* case and the need for change, in the legislative history.[13]

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10. Congress, even before 1972, was not without experience in drafting tolling provisions in statutes of limitations in workers' compensation legislation clearly dependent upon awareness of "disability" as opposed to mere "injury." *See, generally*, Federal Employees' Compensation Act, particularly, 5 U.S.C. §8122.

11. S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972)

12. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), 1972 U.S. Cong. & Adm. News 4698

13. Clearly, Representative Dominick Daniels of New Jersey, who sponsored H.R. 12006 amending the Act in 1972, intended no such far-reaching changes:

In sum, one is unmistakably drawn to the conclusion that both the Court of Appeals and the Board have misinterpreted the statute. Certainly, neither was privileged to rewrite or ignore the "compelling language" of the statute regardless of the incongruous results perceived. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 101 S. Ct. 509 (1980). Nor could the Court of Appeals or the Board save or revive the claim in this instance by post-dating the "injury" by some two years and defining it in terms of wholly external criteria such as a *doctor's diagnosis*, rather than in circumstances "arising out of" and "in the course of" the employment. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, ___ U.S. ___, 102 S. Ct. 1312 (1982).

To clarify this important question of statutory construction and reconcile the meaning of §13(a) *as amended* with *United Engineering*, the Court should grant the writ.

The Substantial Evidence Test

In reversing Judge Vanderheyden's denial of Allan's claim the Board and the Court of Appeals failed to follow the proper standard of review. The Board was required by statute to accept the administrative law judge's findings of fact "if supported by substantial evidence in the record considered

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Footnote 13 (con't)

> The thought I had in mind in incorporating this particular provision in my bill was the fact that sometimes a person does not become aware of the fact that he has suffered an injury resulting from his occupation until considerable time has passed.
>
> He may not be able to discover such an injury within 30 days or a year or two. . . .
>
> More recently the Congress has provided for compensation for pneumoconiosis under the coal miners health and safety law. That was developed in this committee. Then, of course, in other industries, too, you have asbestosis and other similar injuries arising in the textile industry, which are not discovered for many years after exposure.

Hearings on H.R. 247, H.R. 3505, H.R. 12006, H.R. 15023 Before The Select Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 2d Sess., at 112-113 (1972). He does not mention compensability. Moreover, by the examples he mentions, he seems to have been especially concerned with the problem of truly latent, insidious disease.

as a whole." 33 U.S.C. §921(b)(3). The same restrictions on review apply to the courts of appeals. *Potenza v. United Terminals, Inc.*, 524 F.2d 1136 (2d Cir. 1975). To insure that the Board has followed the proper standard on review and not substituted its own views for those of the administrative law judge or engaged in *de novo* review of the evidence, the court of appeals must conduct an independent review of the administrative record. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); and *see, Air America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938). All reasonable inferences drawn from the evidence by the administrative law judge in support of his findings must be accepted on appeal even if diverse inferences might be drawn, regardless whether the reviewing body believes the opposite inference is more reasonable or that the one chosen by the administrative law judge is factually questionable. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 67 S. Ct. 801 (1947). "Even if such an inference be considered more legal than factual in nature" or "involves an application of a broad statutory term or phrase to a specific set of facts [,it] gives rise to no greater scope of judicial review." *Cardillo, supra*, 330 U.S. at 478, 67 S. Ct. at 807. Likewise in reaching his conclusions, an administrative law judge may "credit part of a witness' testimony without accepting all of it." *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 1146 (1968).

There is little in the Court of Appeals' opinion to suggest it made a systematic, independent review of the record to determine if Judge Vanderheyden's findings were supported by substantial evidence. To the contrary, the court fell into the trap of accepting the *Board's* findings and, therefore, because the Board failed to adhere to the appropriate standard, the error was compounded. For instance, in reciting the "facts," the court stated: "Dr. Tobin told Allan . . . that Allan had a bad bruise 'which would go away in time.'" 666

F.2d at 400; (Appendix, p. A-3). The court later reemphasized: "Allan was told several times by Dr. Tobin that his injury was only a bad bruise." 666 F.2d at 401 (Appendix, p. A-7). *Judge Vanderheyden made no such finding.* That Allan may have testified in that vein did not compel Judge Vanderheyden to credit it. Rather, that "finding" was made by the Board, which then drew its own inferences from it.[14]

Finally, both the Board and the Court of Appeals erred in concluding that Allan was not aware he suffered a *compensable* injury until his degenerative disc was diagnosed in November, 1973. Judge Vanderheyden found that Allan was in constant pain after his accident of which he remained acutely aware. His pain worsened and he was also aware he was having difficulty performing his job functions. Judge Vanderheyden concluded this reduced his wage-earning capacity. (Appendix, p. C-33.) Such a finding is not unreasonable despite the fact claimant continued to earn his regular wages.[15]

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14. Like the Court of Appeals, the Board emphasized that Dr. Tobin's "bad bruise" advice was "twice-rendered." (Appendix, p. E-5.) Obviously, it was only Allan's *first* visit to Dr. Tobin which bears any relevance since Judge Vanderheyden concluded that the one-year statute expired in December, 1972 and Allan did not return to Dr. Tobin for the second time until July, 1973. Moreover, the Board concluded that Allan had "acted reasonably in seeking treatment for his pains from Dr. Tobin" up to December, 1973 when he first saw Dr. Gibson. (Appendix, p. E-5.) Judge Vanderheyden, having had the benefit of being present at the taking of testimony, drew conclusions to the contrary. (Appendix, p. C-31.) The issue was not whether there was substantial evidence to support either view. Rather, could a "reasonable mind" accept as adequate to support Judge Vanderheyden's conclusions evidence that Allan waited 19 months to return to Dr. Tobin despite constant pain which interfered with his ability to work and which he readily admitted he had related from the outset to his industrial accident of December 9, 1971? It is repugnant to the purpose and public interest served by statutes of limitations that a claimant be able to toll his limitation period indefinitely by ignoring information readily at his disposal and failing to seek medical advice. *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352 (1979).

15. The Act expressly covers such contingencies. 33 U.S.C. §908(h); and, *see, Potomac Electric Power Co. v. Director, OWCP, supra*, 101 S.

The Court should additionally grant the writ in order to review the standard of review applied by the court below on appeal of the case from the Benefits Review Board.

Respectfully submitted,
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Footnote 15 (con't)

Ct. at 511, fn. 5. Although §908(h) expressly refers to the "deputy commissioner," since 1972, this adjudicatory function has rested with the administrative law judges. 33 U.S.C. §919(d). The Court of Appeals had no difficulty recognizing the compensability of Allan's injury *after* his surgery when his condition had actually *improved*, even though Allan continued in full-time employment. 666 F.2d at 402 (Appendix, p. A-10-12.)